

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 3:05-00207

KANTON TALLEY,
also known as “G.B.”

MEMORANDUM OPINION AND ORDER

On May 2, 2008, this Court entered an Order reducing Defendant Kanton Talley’s sentence pursuant to 18 U.S.C. § 3582(c)(2). Acting pro se, Defendant filed a hand-written Notice of Appeal he dated May 20, 2008, which was docketed by this Court on May 29, 2008. Recognizing that Defendant’s appeal was filed, at earliest, on May 20, 2008,¹ the Fourth Circuit Court of Appeals remanded the case to this Court to determine whether Defendant can show excusable neglect or good cause for failing to file his appeal within the ten-day period provided by Rule 4(b)(1) of the Federal Rules of Appellate Procedure.

Rule 4(b)(1) provides, in relevant part, that “[i]n a criminal case, a defendant’s notice of appeal must be filed in the district court within 10 days after the later of the entry of either the judgment or the order being appealed[.]” *Fed. R. App. P.* 4(b), in part. Rule 4(b)(4) further provides that “[u]pon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for

¹*Citing Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that the time of filing occurs when a “pro se prisoner delivers the notice to prison authorities for mailing”).

a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).” *Id.* Following remand, this Court entered an Order directing Defendant to explain his reasons for failing to file his notice within the ten-day period.

In his response, Defendant asserts that he was unable to file a timely notice because he was in segregation and was unable to access any legal material. Defendant attached to his response a Disposition of the Rules Infraction Board which states that Defendant was placed in “DC W/C”² from April 24, 2008 until May 9, 2008. Defendant also states that he “filed” his notice on May 10, the day after he was released from segregation, which would be within the ten-day window for filing a notice. However, given that Defendant personally dated his notice as May 20, the Court does not credit Defendant’s recollection that he filed the notice on May 10.³ Nevertheless, the issue remains whether or not Defendant’s segregation constitutes excusable neglect or good cause for failing to make a timely appeal.

In deciding this issue, the Court recognizes that Defendant was released from segregation on May 9, and his ten-day deadline did not expire until May 16.⁴ Given the amount of

²The Court contacted Defendant’s case manager at the correctional institution in which he is being held. His case manager informed the Court that “DC W/C” stands for disciplinary control without credit.

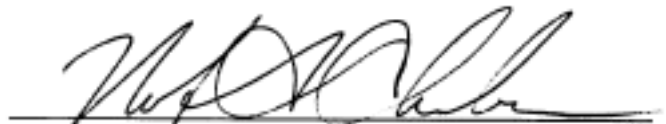
³Defendant’s case manager confirmed to the Court that Defendant was released from disciplinary control on May 9.

⁴Pursuant to Rule 26 of the Federal Rules of Appellate Procedure, the day of an event is excluded from the calculation of time and, when the time period is less than eleven days, intermediate weekends are excluded. In this case, the Order was entered on a Friday, May 2. Thus, the time period began to run on Monday, May 5, excluded Saturday, May 10 and Sunday, May 11, (continued...)

time Defendant had to file his notice following his release from segregation, the Court finds that Defendant could have easily filed the notice before the expiration of the ten-day period. Thus, the Court determines that Defendant's segregation for some of the ten-day period is insufficient to establish excusable neglect or good cause for failing to timely file his notice of appeal.

Having decided the issue remanded by the Fourth Circuit, the Court **DIRECTS** the Clerk to send a copy of this Written Opinion and Order to counsel of record and any unrepresented parties and return the record to the Fourth Circuit Court of Appeals for further consideration.

ENTER: December 8, 2008

A handwritten signature in black ink, appearing to read 'Robert C. Chambers', is written over a horizontal line.

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

⁴(...continued)
and concluded on Friday, May 16.